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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 510th MEETING

Held at the Vienna International Centre, Vienna,
on Thursday, 15 July 1993, at 9.30 a.m.

Chairman: Mr. MOHAMMED (Nigeria)

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The meeting was called to order at 9.45 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued)

Consideration of draft Guide to Enactment (A/CN.9/375) (continued)

1. The CHAIRMAN said he hoped the Commission could conclude its consideration of the draft Guide to Enactment that morning, so that it could begin work that afternoon on the report of the drafting group. He asked if there were any further comments on the section of the Guide relating to article 9.

2. Mr. WALLACE (United States of America) said that he would appreciate the opportunity to revert to the commentary on the Preamble and to commentaries on some early articles.

3. In order to dispel any possible misunderstanding, he wished to stress that nothing he had said the previous day should be taken to mean that his delegation was opposed to adoption of the draft Guide at the current session. He had merely wished to point out that, because of shortage of time, it might be difficult to reach agreement on a final version that would be satisfactory to all. It would have to be left to the Secretariat to revise the Guide in the light of the discussion that had taken place during the session.

4. The CHAIRMAN said there would be no difficulty in proceeding in the way suggested by the United States representative.

Commentary on the Preamble

5. Mr. WALLACE (United States of America) said that the first sentence of the commentary on the Preamble raised difficulties, since, depending on the legal system of the country concerned, the reason for including a statement of objectives might or might not be to provide guidance on the interpretation and application of the Model Law. The question of whether the Preamble had any force in law was a difficult one, and he was not sure whether the Guide should make such a broad statement.

6. Mr. TUVAYANOND (Thailand) said that, for his country at least, the Preamble was important, and he would like it to be retained as it stood.

7. Mr. JAMES (United Kingdom) said that, although a number of countries did not adopt preambles as part of their enacted laws which would have an effect in relation to the interpretation of those laws, that point was covered by the recommendation made in the last sentence of the commentary on the Preamble.

8. He reminded the Commission that the wording contained in the Preamble had once been incorporated in the Model Law itself, as article 3. It had then been decided that it would be more appropriate as a preamble because it did not of itself create substantive rights or obligations. However, it had certainly been regarded as a provision which was meant to influence interpretation of the Model Law. He himself considered the principles enunciated in the Preamble extremely important.

9. Mr. PHUA (Singapore) agreed that the last sentence of the commentary on the Preamble should be sufficient to address the United States representative's concern. If that was not enough, the phrase "or to use preambles in interpreting and applying laws" could perhaps be inserted after "to include preambles" in that sentence.

10. Mr. MORAN BOVIO (Spain) said that, at least in those countries where the system of civil law - rather than common law - applied, the Preamble as now worded would be useful, because the statement of objectives would indeed provide guidance on the interpretation and application of the law, and would be taken into account by legislators and judges. Any difficulties that common law countries might encounter could be overcome by the amendment proposed by the representative of Singapore.

11. Mr. SOLIMAN (Egypt) said he favoured retention of the Preamble as it stood.

12. Mr. LEVY (Canada) supported the proposal made by the representative of Singapore.

13. The commentary on the Preamble, as amended, was adopted.

Commentary on article 1

14. Mr. TUVAYANOND (Thailand) said that in paragraph 1 of the commentary on article 1 the phrase "coverage of all types of procurement" might be understood to mean that the procurement of services was covered. He would prefer the phrase "coverage of procurement of all types of goods and construction".

15. Mr. WALLACE (United States of America) said that he could go along with such a drafting change.

16. With regard to the first two sentences of paragraph 2 of the commentary, he felt that they should be expanded in order to convey the Commission's views about what kinds of regulations should be issued and how they should be issued.

17. Mr. MORAN BOVIO (Spain), pointing out that paragraph 9 of the Introduction stated that the Model Law was a "framework" law intended to be complemented by regulations, suggested that a reference to that paragraph be included in paragraph 2 of the commentary on article 1.

18. Mr. SAHAYDACHNY (Secretariat) said there would be no difficulty in making it clear, perhaps in paragraph 9 of the Introduction, that the procurement regulations referred to in the Model Law should be open and transparent; that point could also be brought out in the commentary on article 1, by means of a cross-reference. In addition, the types of procurement covered could also be specified more clearly.

19. Mr. PHUA (Singapore) suggested the insertion, after the second sentence in paragraph 2, of a reference to article 5 ("Public accessibility of legal texts").

20. The CHAIRMAN took it that the Commission wished to adopt the commentary on article 1, which would be finalized by the Secretariat in the light of the Commission's discussion.

21. It was so decided.

Commentary on article 2

22. Mr. FRIES (United States of America) considered that paragraph 2 should offer guidance on the weight to be attached to the various factors listed there.

23. Mr. WALLACE (United States of America) added that it was not clear what kinds of entities were meant in the case of subparagraph 2 (f) and that subparagraph 2 (g) touched on matters which might be controversial.

24. Mr. LEVY (Canada) said there were limits to the amount of guidance the Commission should offer to sovereign States and doubted whether it could usefully attempt to provide more guidance than that already contained in the Guide, especially where social policy decisions were involved.

25. Mr. MORAN BOVIO (Spain) said that, while he believed that the Commission should not attempt to tell legislators in sovereign States how to deal with internal matters, he also believed that more guidance would assist sovereign States in exercising their sovereignty more effectively.

26. Mr. KINGA (Cameroon) said that the guidance given in paragraph 2 was sufficient. Legislators in developing countries such as his were quite capable of deciding what should be taken into account in applying the Model Law.

27. Mr. PEREZNIETO CASTRO (Mexico), agreeing with the representative of Cameroon, said that the Commission should not attempt to provide guidance on matters properly belonging to the internal affairs of sovereign States. However, national legislators should ideally have all the necessary information, so a balance needed to be struck between providing as much information as possible and not appearing to interfere in the internal affairs of enacting States.

28. Mr. KOMAROV (Russian Federation) said that, while he considered the point raised by the United States delegation to be a valid one, he would not like to see the Commission opening a Pandora's box - for example, by broaching issues related to the social and economic structures of enacting States.

29. Paragraph 2 as it stood at present was, in his opinion, sufficient for drawing the attention of States to factors which should be taken into account. In order to make it even clearer that the list of factors in that paragraph was not an exhaustive one, one might perhaps add in the chapeau the expression "in particular" between "consider" and "factors".

30. Ms. CRISTEA (Observer for Romania) said that the situation envisaged in subparagraph 2 (g) was covered by subparagraph 2 (b), since any entity integrated within a centralized economic plan would be entirely managed or

(Ms. Cristea, observer for Romania)

controlled by the Government; in her opinion, subparagraph 2 (g) could therefore be deleted. Also, she felt that the second part of subparagraph 2 (f) should be deleted as it lacked clarity.

31. Mr. TUVAYANOND (Thailand) supported the views expressed by the observer for Romania.

32. The CHAIRMAN said that, leaving aside the question of the deletions envisaged by the observer for Romania in paragraph 2, the commentary on article 2 appeared to be acceptable to the Commission as it stood. The second comma in the penultimate sentence of paragraph 1 - a typographical error - would be deleted.

33. It was so decided.

Commentary on article 3

34. Mr. WALLACE (United States of America) said that in the last sentence of paragraph 1 it should be made clear that, where international agreements did not apply, procurement would be governed not only by the Model Law but also by other bodies of law - such as contract law. He suggested the addition of a reference to paragraph 10 of the Introduction to the Guide to Enactment.

35. He also suggested that the inconsistency between "EC" and "EEC" in the first sentence of paragraph 1 be eliminated.

36. The CHAIRMAN said that those points would be dealt with by the Secretariat. On that understanding, he took it that the Commission wished to adopt the commentary on article 3.

37. It was so decided.

Commentary on article 4

38. Mr. WALLACE (United States of America) thought that, in the first line of paragraph 1, the reference to "paragraph 7" should be to "paragraphs 7 and 9" and that the last sentence of paragraph 1 should either be spelled out more clearly or deleted.

39. With regard to paragraph 2, in the example "limitation of the quantity of procurement carried out in cases of urgency using a procurement method other than tendering (to what is required to deal with the urgent circumstances)" the words in parentheses should be placed after "quantity" in order to make it clear that procuring entities should not exploit emergencies and procure more than what was needed in order to deal with them.

40. That point was a very important one, and the Guide should highlight it and other important points that did not stand out clearly in the Model Law itself.

41. Mr. TUVAYANOND (Thailand), agreeing to the moving of the words in parentheses in paragraph 2, said that, if there was fear of abuse, a high-level governmental decision could be required in such cases.

42. The CHAIRMAN took it that the Commission wished to adopt the commentary on article 4 subject to the comments made.

43. It was so decided.

Commentaries on articles 5-10

44. Mr. WALLACE (United States of America), referring to the last sentence of paragraph 1 of the commentary on article 8, said that some regional economic groupings did more than just grant procurement preferences to members of the grouping - boycott arrangements being a case in point. With regard to paragraph 2, concerning the problematic "margin of preference" question, he wondered whether that paragraph, which appeared to give advice to Governments rather than merely clarifying issues, should not be deleted. There was no mention of "margin of preference" in article 8.

45. Mr. HUNJA (Chairman of the Working Group) said that a problem the Secretariat had encountered in discussions with delegations from potential enacting States, especially developing countries, concerned the compatibility of international procurement proceedings with the need to develop local industry, and the Secretariat had felt it important, in connection with article 8, to stress that it was not necessary to exclude foreign suppliers and contractors in order to help local suppliers and contractors; the latter could be given a certain advantage through "a margin of preference".

46. Mr. TUVAYANOND (Thailand) said that it should be possible to grant preference to national suppliers and contractors and that it was for the particular Government to decide whether it wished to authorize the granting of preference.

47. Ms. ZHANG Yuejiao (China) said that the granting of a margin of preference to local suppliers and contractors was a common practice and should be allowed for.

48. Mr. JAMES (United Kingdom) said he thought it was useful to refer in the commentary on article 8 to the existence of possibilities for protecting local suppliers and contractors in various ways. However, perhaps the text should be redrafted so as to make it clear that it was not the purpose of the references to articles 17 and 29 to de-emphasize the importance of the "without regard to nationality" principle underlying article 8.

49. Mr. WALSER (Observer for the World Bank), supporting the retention of paragraph 2, said that the paragraph explained why foreign competition should not be completely excluded. It could perhaps be improved by drawing attention to the disadvantages of granting a margin of preference for local suppliers and contractors: firstly, the cost increase if the overall lowest-price tender was not selected and, secondly, reciprocal action on the part of other countries.

50. Mr. PRIESTLEY (Observer for Australia) and Mr. SOLIMAN (Egypt) also supported the retention of paragraph 2.

51. Mr. WALLACE (United States of America) said that, if paragraph 2 was to be retained, it should be redrafted along the lines indicated by the representative of the United Kingdom.

52. The CHAIRMAN said that the comments made by the observer for the World Bank should also be taken into account in the redrafting of the paragraph.

53. Drawing attention to the commentary on article 9, he informed the Commission that the drafting group was finalizing the wording of articles 9 and 25 in the light of the conclusions reached during the Commission's 501st meeting.

54. Mr. UEMURA (Japan) recalled that in its comments on article 9, in document A/CN.9/376/Add.2, his Government had raised the question whether a procuring entity could prohibit the submission of tenders by mail. He hoped the Guide would give a clear indication in that regard.

55. Mr. WALLACE (United States of America) agreed with the representative of Japan; it was important that the matter be dealt with in the Guide.

56. He did not think the intention was that it should be permissible to use electronic data interchange (EDI) for transmitting all the documents involved in procurement under the Model Law, but article 9 as it stood might be taken as implying that EDI could be so used. He felt that the Guide should contain a caveat regarding the limitations of EDI use and that the possibilities of EDI should be considered at a later session.

57. Mr. HERRMANN (Secretary of the Commission) said that article 9 as it stood did not exclude any form of communication except a purely oral message, and it did not preclude the transmission of any type of document by EDI, although there had been talk of not permitting the use of EDI for the transmission of certain documents, such as tender securities. However, the area in question had not been studied in detail by those who had produced the draft Model Law.

58. Mr. WALLACE (United States of America) said that, in the light of what the Secretary of the Commission had just said, the Guide to Enactment should perhaps warn potential enacting States against inadvertently authorizing the unlimited use of EDI.

59. Ms. WEINMEIR (Austria) felt that States could be trusted to resolve the problems associated with the use of EDI in procurement.

60. Mr. LEVY (Canada), supporting the remark made by the Austrian representative, said that EDI was going to be used very extensively in procurement and that in the real world the law had to follow technology, not the other way round.

61. Mr. PHUA (Singapore) said that the Model Law should not be formulated in such a way as to restrict the use of EDI, but he feared that, if the commentary on article 9 was left unchanged, technocrats eager to jump on the EDI bandwagon might interpret the article as an enabling provision. Perhaps the Guide could contain - rather than the caveat envisaged by the United States representative - a statement to the effect that the Model Law should be applied in conjunction with domestic laws enabling the use of EDI; that would focus legislators' minds on the issues raised by the use of EDI.

62. Mr. HERRMANN (Secretary of the Commission), expressing doubts about the suggestion made by the representative of Singapore, said he understood article 9 of the Model Law to mean that all forms of communication except oral messages were acceptable - in other words, all forms including EDI. That being so, he felt it would be illogical to say in the Guide to Enactment that special enabling legislation would be necessary in the case of EDI.

63. Mr. PHUA (Singapore) said that the issue was whether the domestic legislation of potential enacting States permitted the use of EDI. If the use of EDI was already permitted, well and good: the Model Law could be integrated into the domestic legislation with no problem. However, where - for example - it was stated in the domestic legislation that tender securities should be submitted in writing, there would be a conflict with the Model Law, which gave the impression that tender securities could be submitted in electronic form.

64. Mr. FRIES (United States of America) said that it was not necessary to speak of "enabling legislation" in the Guide. A simple reference could be made to "relevant domestic legislation concerning EDI", calling the attention of legislators to the connection between the Model Law and the implementation of EDI technology in their country.

65. Ms. ZIMMERMAN (Canada) said her delegation had been assuming that article 9 provided for the use of EDI provided confidentiality and other requirements were met. Her delegation was now confused as to the Commission's intentions.

66. Mr. WALSER (Observer for the World Bank) said he was unhappy with the language of article 9, which spoke of "a form [of communication] that provides a record of the content of the communication". The Guide should explain what was meant by providing a record of the content of the communication, giving examples of cases where a record was and was not provided.

67. Mr. HERRMANN (Secretary of the Commission), referring to the comments made by the representative of Singapore, said that there need not be a conflict with the Model Law in cases where the domestic legislation required - say - tender securities to be submitted in written form.

68. The Model Law did not envisage the transmission of every conceivable kind of communication by means of EDI. For example, bills of exchange - listed among the forms of "tender security" in article 2 - were subject to very strict requirements in most countries, and their transmission by means of EDI was unlikely to be accepted; much the same would apply in the case of - say - documents providing evidence of nationality.

(Mr. Herrmann, Secretary of the Commission)

69. In his opinion, the reference to EDI in the Guide should - on the lines envisaged by the United States representative - take the form of a warning that enactment of the Model Law would open the way to the use of EDI without any enabling legislation and that enacting States might wish to bear in mind various operational considerations.

70. Mr. PHUA (Singapore) said that he would be satisfied if the Secretary's comment could be reflected in the Guide.

71. The CHAIRMAN, indicating that it would, said he took it that the discussion of the commentary on article 9 was concluded.

72. Since there were no comments on article 10, he considered that the discussion of the commentaries on articles 1-10 was concluded.

The meeting rose at 12.30 p.m.